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Docket No. 95-877

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MAHMOOD M. YOONESSI, M.D.

Petitioner

vs.

STATE UNIVERSITY OF NEW YORK, STEVEN B. SAMPLE, WILLIAM R. GREINER, JOHN P. NAUGHTON, MYROSLAW M. HRESCHCHYSHYN, ANTONINA CANAZZI, CHILDREN'S HOSPITAL OF BUFFALO, ROBERT PATTERSON, MILLARD FILLMORE HOSPITAL, GATES CIRCLE, MICHAEL COHEN, TED JEWETT, DEBORAH LICATA, WILLIAM DILLON, PATRICK K. DUFFNER, LEO A. KANE, DANIEL R. PIERONI ERIE COUNTY MEDICAL CENTER and COUNTY OF ERIE

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF RESPONDENTS CHILDREN'S HOSPITAL OF BUFFALO, ROBERT PATTERSON, MICHAEL COHEN, TED JEWETT, DEBORAH LICATA, WILLIAM DILLON, PATRICK K. DUFFNER, LEO A. KANE and DANIEL R. PIERONI

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LIST OF PARTIES

Upon information and belief, petitioner seeks review as against the following parties, including Children's Hospital of Buffalo, Robert Patterson, Michael Cohen, Ted Jewett, Deborah Licata, William Dillon, Patricia K. Duffner, Leo A. Kane and Daniel R. Pieroni:

State University of New York

Steven B. Sample

William R. Greiner

John P. Naughton

Myroslaw M. Hreshchyshyn

Antonina Canazzi

Children's Hospital of Buffalo

Robert Patterson

Millard Fillmore Hospital

Michael Cohen

Ted Jewett

Deborah Licata

William Dillon

Patricia K. Duffner

Leo A. Kane

Daniel R. Pieroni

The Erie County Medical Center.

County of Erie

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner May Raise a Motion Pursuant to Fed.R.Civ.Proc. 60(b)(6) to the United States Supreme Court Absent Previous Application to the District Court on 60(b) Grounds.

   Answer: No.

2. Whether the District Court's Grant of Summary Judgment to the CHOB Respondents was Proper as Recognized by the Second Circuit by Their Denial of Petitioner's Application for Leave to Appeal.

   Answer: Yes.

3. Whether Special and Important Reasons Exist to Warrant the Exercise of this Court's Jurisdiction.

   Answer: No.

STATEMENT OF THE CASE

This Statement of the Case is limited to a brief recitation of the pertinent facts and procedural background as relates to respondents Children's Hospital of Buffalo, Robert Patterson, Michael Cohen, Ted Jewett, Deborah Licata, William Dillon, Patricia Duffner and Daniel R. Pieroni (hereinafter collectively referred to as "the CHOB respondents".[1]

Petitioner, a gynecologist, was employed by the State University of New York at Buffalo, Department of Gynecology/Obstetrics and the Erie County Medical Center. Until December 31, 1988, petitioner was also a member of the Children's Hospital Medical Staff and had clinical privileges at Children's Hospital. Petitioner was never an employee of Children's Hospital. By letter dated April 19, 1989, Children's Hospital advised petitioner that his appointment to the medical staff and clinical privileges had expired on December 31, 1988 and that he would have to reapply if he wished to have staff membership and clinical privileges. Petitioner failed to submit an application for reappointment or otherwise respond to the April 19, 1989 letter resulting in termination of his staff membership and clinical privileges.

On or about January 29, 1993, petitioner brought this action on several counts, all of which are primary based on employment and discrimination, wrongful termination of

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[1] The respondent, Children's Hospital of Buffalo shall be referred to as "Children's Hospital" when referred to separately from the other CHOB respondents.

employment and/or violation of due process and equal protection rights.[2] As against Children's Hospital, petitioner claims discrimination based on his Iranian origin and wrongful termination of staff privileges. Violations of 42 U.S.C. §2000e et seq. (Title VII), 42 U.S.C. §§1981, 1983 and 1985, constitutional rights to due process and equal protection and New York State statutory and common law are alleged to have been occasioned by Children's Hospital.

It is unclear why the individual CHOB respondents, Patterson, Cohen, Jewett, Licata, Dillon, Duffner, Kane and Pieroni have been sued other than in connection with their position at Children's Hospital and any role they may have played in not accepting petitioner's incomplete application for reappointment on staff.

The CHOB respondents moved to dismiss petitioner's complaint pursuant to F.R.C.P. 12(b)(1), (2) and (6). All other respondents similarly moved to dismiss the complaint. The parties consented to have Magistrate Heckman hear and decide the motions. On notice to the parties, Magistrate Heckman converted the motions to dismiss to summary judgment motions under Rule 56.

Magistrate Heckman granted all respondents' motions for summary judgment with prejudice, and entered a decision and order, and, a final judgment, on November 30, 1993. Magistrate Heckman dismissed the employment discrimination claims against the CHOB respondents on the grounds that petitioner failed to meet the statutory condition precedent to

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[2] In addition to allegations pertaining to his medical staff membership and clinical privileges at Children's Hospital, petitioner's complaint contains allegations pertaining to: 1) his employment by, academic status at and participation in the Clinical Practice Plan of the State University of New York at Buffalo; 2) his employment status at the Erie County Medical Center and Buffalo General Hospital; and 3) his staff membership and clinical privileges at Millard Fillmore Hospital.

bringing suit in federal court by his failure to timely file a charge with the appropriate administrative agency. Magistrate Heckman dismissed the other constitutional claims against the CHOB respondents on the grounds that the applicable Statute of Limitations bars petitioner from pursuing his claims.[3]

By order of the United States District Court for the Western District of New York (Arcara, J.), dated August 26, 1994, and filed September 1, 1994, Magistrate Heckman's decision, order and final judgment granting respondents' motions for summary judgment was affirmed.

By decision dated May 30, 1995 and judgment entered the same day, the United States Court of Appeals for the Second Circuit denied petitioner's petition for leave to appeal. Petitioner's petition for rehearing was denied by the United States Court of Appeals for the Second Circuit by order dated June 30, 1995 and filed the same day.

Petitioner seeks a writ of certiorari as set forth in his petition dated September 25, 1995 and filed in the Supreme Court of the United States on September 28, 1995. Petitioner was initially represented by counsel in the District Court but thereafter appeared pro se and makes this application pro se. This brief is submitted in opposition to said petition.

For the reasons set forth below, it is respectfully requested that the petition be denied in its entirety as neither special nor important reasons support the petition. Moreover, the decisions of the District Court and the Second Circuit were properly made.

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[3] The state claims were properly dismissed by Magistrate Heckman for lack of jurisdiction. 28 U.S.C. §1367(c)(3).

SUMMARY OF ARGUMENT

The District Court's grant of summary judgment pursuant to Fed.R.Civ. P.56 to the CHOB respondents was proper. Neither special nor important reasons exist to support the petition for certiorari. Petitioner's attempted motion pursuant to Fed.R.Civ.Proc. 60(b)(6) is untimely and the Supreme Court of the United States is without jurisdiction to entertain such motion. Accordingly, the petition should be denied in its entirety.

I.

Petitioner's motion pursuant to Fed.R.Civ.Proc. 60(b)(6) is untimely and the Supreme Court of the United States lacks jurisdiction to entertain such motion.

Petitioner states the "Questions Presented" as whether Fed.R.Civ.Proc. 60(b)(6) applies to the case at hand to grant relief from injustice. In that section of his petition entitled "Reasons for Granting the Writ" petitioner alleges fraud and misconduct concerning the respondents Clinical Practice Management Plan.

The following arguments are presented to the extent petitioner intends his petition to serve as a motion pursuant to Fed.R.Civ.Proc. 60(b)(6) and/or the Court interprets the petition to constitute such a motion.

Fed.R.Civ.Proc. 60(b) permits a district court to relieve a party of a final judgment for any one of five specified reasons or for "any other reason justifying relief from the operation of the judgment". The first three of the five specified reasons are: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); and (3) fraud (whether heretofore, denominated intrinsic or extrinsic), misrepresentation or other misconduct of an averse party. To take advantage of any of these three reasons the Rule requires a litigant to seek relief "not more than one year after the judgment, order or proceeding was entered or taken."

In the instant case, the one-year limitation bars petitioner because the petition to set aside the judgment shows, at most, nothing but fraud and misconduct. The petitioner can not avail

himself of the broad "any other reason" clause of 60(b)(6) as he attempts to do.

The judgment which is the subject of this petition is the order of the District Court entered on November 30, 1993 granting summary judgment to the CHOB and other respondents. Petitioner's instant attempt to make a 60(b)(6) motion is accordingly untimely and inappropriately made for the first time to the United States Supreme Court.

Additionally, it is significant that the allegations of fraud and misconduct are made with respect to the Clinical Practice Management Plan. This record contains no evidence that the CHOB respondents had any involvement in this Plan.

Petitioner simply seeks further reconsideration of his claims by the District Court without indicating any change of circumstances. In fact, petitioner admits that his assertions of fraud and misconduct have been "consistently asserted". Thus, the proper way for petitioner to challenge the District Court's ruling was through appeal, and not by a 60(b)(6) motion made after his appeal was unsuccessfully made.

II.

Special and Important Reasons do not Exist to Warrant the Exercise of this Court's Discretion.

"A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefore." Sup.Ct.R. 10. There are not special and important reasons justifying a review on writ of certiorari in the instant case. The District Court's decision does not conflict with the decisions of any other United States Courts of Appeals on the same matter; nor did it decide a federal question in a way which conflicts with the State Court of last resort; nor did it depart from the accepted and usual course of judicial proceedings as to warrant exercise of the discretion of this Court. Further, the District Court did not decide an important question of federal law which has yet to be settled by this court or which conflicts with applicable decisions of this court. Sup.Ct.R. 10. As demonstrated by the subsequent sections of this argument, the grant of summary judgment by the District Court to the CHOB respondents was appropriate, as recognized by the Second Circuit by its decision denying petitioner leave to appeal.

Petitioner seeks this writ stating that he can prove fraud and misconduct by respondents, specifically with respect to the Clinical Practice Management Plan. The gravamen of petitioner's claim is that he was fraudulently deprived of income. Thus, the grounds of his petition affect not the public but only some, and significantly not all,[4] the parties to this action. This is unchanged by petitioner's bald assertion, made for the first time to the United States

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[4] As above, the CHOB respondents had no involvement in the Clinical Practice Management Plan.

Supreme Court, that community health has thus been placed at risk. "Special and important reasons" which would justify granting a writ of certiorari by the Supreme Court implies a problem beyond the academic or episodic. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955). Even assuming arguendo the truth of petitioner's allegations, his problem is episodic in nature and not one which justifies granting of a writ of certiorari by this Court.

III.

As Recognized by the Second Circuit in its Denial to Petitioner of Leave to Appeal, the District Court's Grant of Summary Judgment to the CHOB Respondents was Proper.

As set forth below, the District Court relied on well established case law and principles in considering the CHOB respondents' motion for summary judgment. None of the issue raised or decided meet the criteria set forth in Sup.Ct.R. 10 to justify granting the petition. Accordingly, the petition should be dismissed in its entirety.

A. Magistrate Heckman properly dismissed plaintiff's claims against the CHOB respondents for failure to timely file a claim with the proper administrative agency, and/or because they were barred by the applicable statute of limitations.

Where there are no disputed issues of fact, the granting of summary judgment is entirely proper. Whelan v. New Mexico Western Oil & Gas Co., 226 F.2d 156, 159 (10th Cir. 1955); Stanford v. Kuwait Airways Corp., 648 F.Supp. 1158, 1160 (S.D.N.Y. 1986). "[C]ourts should not be reluctant to grant summary judgment in appropriate cases since '[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims,' Celotex Corp. v. Cateret, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986), thereby permitting courts to avoid '. . . protracted, expensive and harassing trials.' [Citation omitted]." Witter v. Abell-Howe Co., 765 F.Supp. 1144, 1147 (W.D.N.Y. 1991).

In the instant case, petitioner's complaint asserts five counts for relief, four of which are asserted against the CHOB respondents. The crux of the claims can be summarized as follows. Petitioner claims that his termination was wrongful because he was discriminated against based

on his ethnic origin in violation of 42 U.S.C. §§1981, 1983, 1985, 2000e (Title VII), and the Civil Rights Act of 1991. He further claims that his staff privileges were terminated without due process and in violation of the equal protection clause. He also asserts that he was denied an opportunity for a "name-clearing" hearing. Magistrate Heckman granted an order dismissing the complaint as against the CHOB respondents based on the Statute of Limitations bar and the failure to timely file a claim with the proper administrative agency.

Petitioner's Employment Discrimination Claims are Barred for Failure to Timely File a Charge with the Appropriate Administrative Agency.

In order to assert a claim for relief in federal court based on a violation of Title VII, petitioner must have filed a claim with the proper administrative agency, i.e., the Equal Employment Opportunity Commission ("EEOC") or the New York State Human Division of Rights ("NYSDHR"). Moche v. City Univ. of New York, 781 F.Supp. 160, 166 (E.D.N.Y. 1992) *aff'd.*, 999 F.2d 538 (2d Cir. 1993); Tadros v. Coleman, 717 F.Supp. 996 (S.D.N.Y. 1989) *aff'd.*, 898 F.2d 10 *cert. denied*, 111 S.Ct. 186 (1990). The statute requires that such a claim be filed within 300 days from the date on which plaintiff received notice of the alleged discriminatory act. 42 U.S.C. §2000e-5(e); Tadros, supra, 717 F.Supp. at 1006-1007.

In the instant case, petitioner's complaint does not allege a specific date pertaining to any alleged discriminatory act of the CHOB respondents. Rather, in opposition to respondents motion, petitioner asserted that he was discriminated against by the Children's Hospital's Credentials Committee on January 12, 1989, when the Committee failed to act on his application for reappointment. He also asserted that he did not learn of the discriminatory act until a "later undisclosed date." However, on April 19, 1989, Dr. John P. Menchini, President of the

Medical/Dental Staff at the Children's Hospital of Buffalo, issued a letter to petitioner, advising him that his appointment had expired as of December 31, 1988. The Hospital advised petitioner that because he had not submitted a completed form for reappointment, he would have to reapply. In dismissing the complaint, Magistrate Heckman properly held that the accrual of the claim occurred when petitioner received this notice, not when it took effect. O'Malley v. GTE Serv. Corp., 758 F.2d 818, 820 (2d Cir. 1985). Thus, plaintiff's claim accrued, at the latest, on April 19, 1989. Petitioner has not disputed that he received this notice.

The record is devoid of any evidence that petitioner filed a claim with the proper administrative agency after receiving this notice. Petitioner's assertion that he filed a claim with the Public Health Council does not fulfill the requirements of the statute. In order to sue in federal court under Title VII, petitioner must have filed a complaint with the appropriate administrative agency, not merely an administrative agency. Thus, the failure to file a claim with the EEOC or the NYSDHR within 300 days of April 19, 1989 bars any claim for employment discrimination under either Title VII or 42 U.S.C. §§1981, 1983 or 1985.

B. Petitioner's Claims for Substantive Violations of 42 U.S.C. §§1981, 1983, 1985 and the Civil Rights Act of 1991 are Barred by the Applicable Statute of Limitations.

Petitioner's claims for violation of any substantive rights distinct from Title VII are governed by New York's 3-year personal injury statute under CPLR 214(5). Day v. Morgenthau, 909 F.2d 75, 78 (2d Cir. 1990). The claim accrues when petitioner knows or has reason to know of the injury which is the basis of the action. Barrett v. United States, 689 F.2d 324, 333 (2d Cir. 1982) *cert. denied*, 462 U.S. 1131 (1983). This occurred here when

petitioner received notice of the decision to terminate him from appointment on the Children's Hospital medical staff.

In the instant case, it is undisputed that petitioner received notice of the expiration of his appointment on April 19, 1989. Consequently, a complaint under the aforementioned statutes should have been filed and served on or before April 19, 1992, three years from the date of the alleged injury. The complaint in this matter was filed on or about January 29, 1993, well in excess of the three-year statute. Clearly, Magistrate Heckman's decision and order dismissing those claims is entirely proper.

Moreover, because 42 U.S.C. §1983 provides the exclusive remedy for securing redress of constitutional violation, Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (*en banc*), petitioner's equal protection and due process claims asserted against the CHOB respondents are likewise barred by the Statute of Limitations.

C. Petitioner Failed to Demonstrate any Equitable Reasons for Tolling the Statute of Limitations.

Petitioner alleged a discrepancy in the minutes of the January 12, 1989 Credentials Committee as grounds for tolling the Statute of Limitations. A Statute of Limitations may be tolled or a defendant may be estopped from asserting it as a defense where the defendant's actions evidence misconduct or bad faith which would mislead a plaintiff into delaying the filing of a charge. O'Malley v. GTE Serv. Corp., supra, 758 F.2d at 822. Without any evidence in the record, petitioner baldly asserts that the discrepancy in the minutes is evidence of "bad faith" during the limitations period which requires the application of the principle of equitable estoppel or tolling in order to allow his claims against the CHOB respondents to proceed. Those principles do not apply here. First, petitioner has made no showing that the minutes were

altered by the respondents. Second, there is no evidence in the record that the tampering occurred during the limitations period so as to invoke the "continuing violation" exception to Title VII's stringent time limits. See, LaBeach v. Nestle Co., 658 F.Supp. 676, 686-87 (S.D.N.Y. 1987). Third, there is no evidence linking that action to the CHOB respondents which would have allowed Magistrate Heckman to find that the CHOB respondents should have known that such actions could cause the plaintiff to delay filing his charge. Fourth, even if a discrepancy in the minutes was caused by the CHOB respondents during the limitation period, the letter of April 12, 1989 clearly explains to petitioner that his appointment expired and this application for reappointment was incomplete and he would have to commence the application process anew. Thus, petitioner's assertion that a discrepancy existed in the minutes and evidenced "bad faith" is nothing more than a smoke screen. As of April 1989, petitioner had unequivocal notice of termination. Any discrepancy in minutes which pre-dated that letter is wholly irrelevant and insufficient to serve as a basis for applying the equitable principles of tolling and estoppel.

This record is void of any evidence which would compel a court to apply the principles of equitable estoppel or tolling to allow petitioner's claims to proceed. As Magistrate Heckman noted, petitioner was represented by counsel throughout the matter. His claims that he did not know about the Hospital's discriminatory policies at the time of the April 1989 letter are without any factual support in the record. There is no evidence that the CHOB respondents were guilty of "bad faith" or misconduct in causing a delay in the filing of petitioner's administrative charge of employment discrimination against them. Petitioner did nothing to protect his privileges at Children's Hospital, but relied instead on the grievance and arbitration procedures in the

collective bargaining agreement between his employer SUNY and his unions.[5] In fact, the record contains no evidence that petitioner ever filed a charge with the EEOC or the NYSDHR. Thus, the principles petitioner seeks to invoke could not be applied here in the abstract.

[5] The filing of a grievance with the union also does not toll the 300-day period of filing a charge with the EEOC or the NYSDHR. Electrical Workers v. Robbins & Meyers, Inc., 429 U.S. 229, 236 (1976). Contractual rights under a collective bargaining agreement are independent from the statutory rights under Title VII. *Id.* at 236.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny petitioner's petition for a writ of certiorari to the Second Circuit Court of Appeals as neither special nor important reasons exist. Moreover, the District Court's grant of summary judgment to the CHOB respondents was proper and petitioner's attempt at a 60(b)(6) motion for the first time to this Court is untimely and improper.

DATED: BUFFALO, NEW YORK
January 3, 1996

KENNEY, KANALEY, SHELTON,
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SUPREME COURT OF THE UNITED STATES

MAHMOOD M. YOONESSI, M.D.

Petitioner

vs.

STATE UNIVERSITY OF NEW YORK, STEVEN B. SAMPLE, WILLIAM R. GREINER, JOHN P. NAUGHTON, MYROSLAW M. HRESCHCHYSHYN, ANTONINA CANAZZI, CHILDREN'S HOSPITAL OF BUFFALO, ROBERT PATTERSON, MILLARD FILLMORE HOSPITAL, GATES CIRCLE, MICHAEL COHEN, TED JEWETT, DEBORAH LICATA, WILLIAM DILLON, PATRICK K. DUFFNER, LEO A. KANE, DANIEL R. PIERONI ERIE COUNTY MEDICAL CENTER and COUNTY OF ERIE

Respondents.

STATE OF NEW YORK)
CITY OF BUFFALO) ss.:
COUNTY OF ERIE)

The undersigned being duly sworn deposes and says:

1. That deponent is not a party to the action, is over eighteen years of age and resides in Lancaster, New York.

2. That on the 3rd day of January, 1996, deponent served the annexed BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF RESPONDENTS CHILDREN'S HOSPITAL OF BUFFALO, ROBERT PATTERSON, MICHAEL COHEN, TED JEWETT, DEBORAH LICATA, WILLIAM DILLON, PATRICK K. DUFFNER, LEO A. KANE and DANIEL R. PIERONI on the petition at the address designated by said petitioner and on the attorneys for the co-respondents by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office-official depository under the exclusive care and custody of the United States Post Office Department, within the State of New York as follows:

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Sworn to before me this 3rd
day of January, 1996.

Notary Public